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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 ROBERT WALLACE CHARD,

12 Petitioner,

13 v.

14 FERNANDO GONZALEZ,  
15 WARDEN,

16 Respondent.  
17

Case No. SACV 08-1160-CAS (OP)

ORDER TO SHOW CAUSE RE:  
DISMISSAL OF PETITION FOR  
WRIT OF HABEAS CORPUS BY A  
PERSON IN STATE CUSTODY  
(28 U.S.C. § 2254) AS UNTIMELY

18 I.

19 INTRODUCTION

20 On October 16, 2008, Robert Wallace Chard ("Petitioner"), through  
21 counsel, filed the current Petition for Writ of Habeas Corpus by a Person in State  
22 custody pursuant to 28 U.S.C. § 2254 ("Petition").

23 Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the  
24 United States District Courts, the Court has examined the current Petition and  
25 finds that it plainly appears from its face that Petitioner is not entitled to relief in  
26 the district court. Specifically, the Court finds that the Petition is subject to  
27 summary dismissal because the information provided indicates that the Petition is  
28 untimely.



1 On October 16, 2008, Petitioner filed the current Petition.

2 For the reasons discussed below, Petitioner is ordered to show cause why  
3 the current Petition should not be dismissed with prejudice as untimely.

4 **III.**

5 **DISCUSSION**

6 **A. Standard of Review.**

7 This Court may entertain a habeas application on behalf of a person who is  
8 in custody pursuant to a state court judgment and in violation of the Constitution,  
9 laws, or treaties of the United States. See 28 U.S.C. § 2254(a). The Court need  
10 neither grant the writ nor order a return if it appears from the application that the  
11 applicant is not entitled to relief. See 28 U.S.C. § 2243. “If it plainly appears  
12 from the face of the petition and any exhibits annexed to it that the petitioner is  
13 not entitled to relief in the district court, the judge must dismiss the petition and  
14 direct the clerk to notify the petitioner.” Rule 4 of the Rules Governing Section  
15 2254 Cases in United States District Courts, 28 U.S.C. foll. § 2254; see also  
16 Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (summary dismissal is  
17 appropriate where the allegations in the petition are vague or conclusory,  
18 palpably incredible, or patently frivolous or false). Further, the Court has the  
19 authority to raise the statute of limitations issue *sua sponte* and to dismiss the  
20 petition on those grounds. Herbst v. Cook, 260 F.3d 1039, 1043 (9th Cir. 2001).  
21 However, that authority should only be exercised after a petitioner is provided  
22 with adequate notice and an opportunity to respond. Id.

23 **B. The Petition Was Not Filed Within the Limitation Period.**

24 The current Petition was filed after the Antiterrorism and Effective Death  
25 Penalty Act of 1996 (“AEDPA”) was signed into law and is, thus, subject to the  
26 AEDPA’s one-year statute of limitations period, as set forth under 28 U.S.C. §  
27 2244(d). See Calderon v. U. S. Dist. Court (Beeler), 128 F.3d 1283, 1286 (9th  
28

1 Cir. 1997).<sup>2</sup> In most cases, the limitation period begins to run from “the date on  
2 which the judgment became final by conclusion of direct review or the expiration  
3 of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

4 As discussed above, Petitioner appealed the judgment of conviction to the  
5 California Court of Appeal. On November 26, 2003, the court of appeal filed a  
6 remittitur.<sup>3</sup> (Id. at 2, 3.) Petitioner did not file a petition for review in the  
7 California Supreme Court. (Id. at 3; Official Records of California Courts.) As a  
8 result, Petitioner’s conviction became final forty days later, on January 5, 2004.  
9 See Cal. R. Ct. 8.264(b)(1), 8.500(e)(1). Petitioner had until January 4, 2005, to  
10 file the current Petition. 28 U.S.C. § 2244(d)(1)(A); see also Patterson v.  
11 Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Petitioner did not file the current  
12 Petition until October 26, 2008, over three and one half years after the limitation  
13 period expired. Thus, absent applicable statutory tolling, equitable tolling, or an  
14 alternate start date to the AEDPA’s limitations period under 28 U.S.C. §  
15 2244(d)(1), the current Petition is untimely.

16 **C. Statutory Tolling of the Limitation Period Pursuant to 28 U.S.C. §**  
17 **2244(d)(2)**

18 Title 28 U.S.C. § 2244(d)(2) provides that “[t]he time during which a  
19 properly filed application for State post-conviction or other collateral review with  
20 respect to the pertinent judgment or claim is pending shall not be counted toward  
21 any period of limitation under this subsection.” Patterson, 251 F.3d at 1247.

22 The United States Supreme Court has held the statute of limitations is  
23 tolled where a petitioner is properly pursuing post-conviction relief. Carey v.  
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25 <sup>2</sup> Beeler was overruled on other grounds in Calderon v. U. S. Dist. Court  
26 (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en banc).

27 <sup>3</sup> While the court of appeal affirmed the judgment in Petitioner’s case on  
28 September 18, 2003, the Court will use the November 26, 2003, date for  
purposes of its analysis.

1 Saffold, 536 U.S. 214, 219-21, 122 S. Ct. 2134, 2137-39, 153 L. Ed. 2d 260  
 2 (2002). The period tolled includes the intervals between one state court's  
 3 disposition of a habeas petition and the filing of a habeas petition at the next  
 4 level of the state court system. Id. In Nino v. Galaza, 183 F.3d 1003, 1006 (9th  
 5 Cir. 1999), the Ninth Circuit held that "the statute of limitations is tolled from the  
 6 time the first state habeas petition is filed until the California Supreme Court  
 7 rejects the petitioner's final collateral challenge." Claims denied as untimely or  
 8 determined by the federal courts to have been untimely in state court will not  
 9 satisfy the requirements for statutory tolling. Evans v. Chavis, 546 U.S. 189,  
 10 192-93, 126 S. Ct. 846, 163 L. Ed. 2d 684 (2006) (citing Carey, 536 U.S. at 222-  
 11 23).<sup>4</sup>

12 As set forth above, Petitioner's conviction became final on January 5,  
 13 2004, and the limitation period ended January 4, 2005. Statutory tolling is  
 14 unavailable where, as here, Petitioner's first state habeas petition in the Orange  
 15 County Superior Court was not filed until September 12, 2007, over two and one  
 16 half years after the expiration of the AEDPA limitation period. (Pet. Exs. 1, 2.)  
 17 Section 2244(d) does not permit the reinitiation of the AEDPA limitation period  
 18 that has ended before a state habeas petition is filed. Ferguson v. Palmateer, 321  
 19 F.3d 820, 823 (9th Cir. 2003) (holding that § 2244(d) "does not permit the  
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21 <sup>4</sup> The Court in Evans held that a California Supreme Court order silent on  
 22 the grounds for the court's decision is not equivalent to a holding that the filing  
 23 was timely. Evans, 546 U.S. at 197-98. Thus, in the absence of clear direction or  
 24 explanation from the California Supreme Court about the meaning of the term  
 25 "reasonable time" (in which to file a habeas petition), or clear indication that a  
 26 particular request for appellate review was timely or untimely, the federal court  
 27 must itself examine the delay in each case and determine what the state courts  
 28 would have held with respect to timeliness. Id. at 198. That is, "the federal court  
 must decide whether the filing of the request for state-court appellate review (in  
 state collateral review proceedings) was made within what California would  
 consider a 'reasonable time.'" Id.

reinitiation of the limitations period that has ended before the state petition was filed,” even if the state petition was timely filed); see also Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001); Wixom v. Washington, 264 F.3d 894, 898-99 (9th Cir. 2001). For the same reason, Petitioner is not entitled to statutory tolling for the two other habeas petitions he filed in the California Court of Appeal and the California Supreme Court. Since Petitioner filed his state habeas petitions well after the AEDPA limitation expired, he may not avail himself of statutory tolling to render the current Petition timely. Thus, absent equitable tolling or an alternate start date for the statute of limitations, it appears that the current Petition is untimely.

#### **D. Equitable Tolling**

The one-year limitation period is subject to equitable tolling if a petitioner demonstrates: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” Pace, 544 U.S. at 418.<sup>5</sup> A petitioner bears the burden of alleging facts that would give rise to tolling. Id. “[T]he threshold necessary to trigger equitable tolling under [the] AEDPA is very high, lest the exceptions swallow the rule.” Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002) (internal quotation marks and citation omitted). This high bar is necessary to effectuate the “AEDPA’s statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims.” Guillory v. Roe, 329 F.3d 1015, 1018 (9th Cir. 2003) (internal quotation marks and citation omitted). Equitable tolling

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<sup>5</sup> The Supreme Court in Pace noted that it has “never squarely addressed the question whether equitable tolling is applicable to AEDPA’s statute of limitations.” Pace, 544 U.S. at 418 n.8. The Supreme Court declined to consider the issue in that case and assumed for the sake of argument that it did, because the respondent assumed as much, and the petitioner was not entitled to tolling under any standard. Id.



determinations are “highly fact-dependent.” Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc) (per curiam); accord Lott v. Mueller, 304 F.3d 918, 923 (9th Cir. 2002) (observing that equitable tolling determinations “turn[ ] on an examination of detailed facts”). The face of the Petition does not set forth any facts showing that Petitioner is entitled to equitable tolling. Thus, as set forth above, it appears that the current Petition is untimely.

**E. Alternate Start of the Statute of Limitations**

**1. State-Created Impediment.**

In rare instances, AEDPA provides that its one-year limitations period shall run from “the date on which the impediment of filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action.” 28 U.S.C. § 2244(d)(1)(B). Asserting that the statute of limitations was delayed by a state-created impediment requires a showing of a due process violation. Lott, 304 F.3d at 925. The face of the Petition does not set forth any facts showing that Petitioner is entitled to relief under this provision.

**2. Newly Recognized Constitutional Right.**

The AEDPA also provides that, if a claim is based upon a constitutional right that is newly recognized and applied retroactively to habeas cases by the United States Supreme Court, the one-year limitations period begins to run on the date which the new right was initially recognized by the United States Supreme Court. 28 U.S.C. § 2244(d)(1)(C). The current Petition raises three claims, two based on Eighth Amendment grounds, and one based on Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007). (Pet. at 5, 6.)

The Ninth Circuit has recently held that Cunningham did not announce a new rule of constitutional law within the meaning of Teague v. Lane, 489 U.S.

1 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989),<sup>6</sup> and therefore, Cunningham  
2 could be applied retroactively on collateral review. Butler v. Curry, 528 F.3d  
3 624, 639 (9th Cir. 2008). In Butler, the Ninth Circuit concluded that the result in  
4 Cunningham was clearly dictated by the Supreme Court's Sixth Amendment case  
5 law, in particular by Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159  
6 L. Ed. 2d 403 (2004), which was decided before the conviction of the petitioner  
7 in Butler became final. Butler, 528 F.3d at 628.

8 Although Butler held that Cunningham applied the existing rules from  
9 Blakely, the current Petition is still untimely. The decision in Blakely was issued  
10 on June 24, 2004. Unlike the petitioner in Butler, Petitioner's conviction became  
11 final on January 5, 2004. Petitioner also did not file his first state habeas petition  
12 until September 12, 2007, over three years after the Blakely decision and over  
13 two and one half years after the limitation period had expired. Thus, Butler is  
14 inapplicable to Petitioner's case.

15 Moreover, assuming Cunningham announced a right newly recognized by  
16 the Supreme Court, the right must not only be newly recognized, but must also be  
17 made retroactively applicable to cases on collateral review. See 28 U.S.C. §  
18 2244(d)(1)(C). The Ninth Circuit has held that the rule in Apprendi is not  
19 retroactive to cases on collateral review. See Rees v. Hill, 286 F.3d 1103, 1104  
20 (9th Cir. 2002) (Apprendi does not apply retroactively). The Ninth Circuit has  
21 also held that Blakely is not retroactively applicable to cases on collateral review.  
22 See Schardt v. Payne, 414 F.3d 1025, 1036 (9th Cir. 2005) (concluding that  
23 Blakely does not apply retroactively to cases on § 2254 habeas review). Given  
24 that Cunningham applied the reasoning of Apprendi and Blakely to California's  
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26 <sup>6</sup> Under Teague, "old" rules of criminal procedure apply "both on direct  
27 and collateral review, but a new rule is generally applicable only to cases that are  
28 still on direct review." Whorton v. Bockting, 549 U.S. 406, 127 S. Ct. 1173,  
1180, 167 L. Ed. 2d 1 (2007).



1 upper term sentencing scheme, it appears that the Supreme Court would likewise  
2 find that Cunningham does not apply retroactively. Thus, Petitioner cannot rely  
3 on Cunningham to bring this claim under 28 U.S.C. § 2244(d)(1)(C).

4 **3. Discovery of Factual Predicate.**

5 The AEDPA further provides that, in certain cases, its one-year limitations  
6 period shall run from “the date on which the factual predicate of the claim or  
7 claims presented could have been discovered through the exercise of due  
8 diligence.” 28 U.S.C. § 2244(d)(1)(D). The face of the Petition does not set  
9 forth any facts showing that Petitioner is entitled to relief under this provision.

10 **IV.**

11 **ORDER**

12 Based upon the foregoing, the Court finds that the face of the Petition  
13 indicates that it is untimely. Accordingly, Petitioner is ordered to show cause  
14 why the Petition should not be dismissed as untimely by filing a response within  
15 thirty (30) days of the date of this Order. In the response to this Order to Show  
16 Cause (“OSC”), Petitioner shall make clear the dates on which any state habeas  
17 petition was filed and shall, if possible, attach copies of any state petition  
18 (showing that it was filed) and copies of the state court’s decision addressing  
19 each petition. All facts relied upon by Petitioner must be proved by testimony  
20 contained in a declaration signed under penalty of perjury pursuant to 28 U.S.C.  
21 § 1746, or in properly authenticated documents. Petitioner must describe  
22 specifically the nature and duration of any extraordinary circumstances and their  
23 consequences in a declaration signed by him under penalty of perjury. Petitioner  
24 shall also include with his response properly authenticated prison records or  
25 documents which demonstrate any circumstance which Petitioner believes  
26 impeded his ability to timely file the current Petition.


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1 Failure to comply with these requirements may result in the dismissal of  
2 this action for failure to prosecute and/or failure to comply with a court order.  
3 Failure to remedy the deficiencies discussed may also result in a recommendation  
4 that the action be dismissed.

5  
6 **IT IS SO ORDERED.**

7  
8 DATED: October 27, 2008

  
HONORABLE OSWALD PARADA  
United States Magistrate Judge